



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/859,716	05/17/2001	Raymond S. Wach	EMPIR-022AUS	4114

22494 7590 10/12/2004

DALY, CROWLEY & MOFFORD, LLP
SUITE 101
275 TURNPIKE STREET
CANTON, MA 02021-2310

EXAMINER

TAYLOR, NICHOLAS R

ART UNIT PAPER NUMBER

2141

DATE MAILED: 10/12/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/859,716

Applicant(s)

WACH, RAYMOND S.

Examiner

Nicholas R Taylor

Art Unit

2141

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 17 May 2001.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-36 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-36 is/are rejected.
- 7) ☒ Claim(s) 15, 17 and 18 is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 17 May 2001 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____.
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____.

DETAILED ACTION

1. Claims 1-36 have been examined and are rejected.

Claim Objections

2. Claims 15 and its dependent claims 17 and 18 are objected to under 37 CFR 1.75(b), as not being substantially different from previous claims and being unduly multiplied. Specifically, the claims duplicate claim 6 with its dependent claims 9 and 10. Applicant is required to cancel or amend the claims.

Claim Rejections - 35 USC § 102

3. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

4. Claims 1-3, 5, 8, 19, 20, 21, 23, and 26 are rejected under 35 U.S.C. 102(a) as being anticipated by Scarlat et al. (US Patent 6,477,483.)

a. As per claims 1 and 19, Scarlat teaches a method of performing distributed testing of a target comprising the steps of (column 2, lines 33-36):

identifying at least one system which meets a predetermined criteria (column 4, lines 14-19);

scheduling said at least one system to provide load to said target (column 4, lines 14-19);

deploying said at least one system at the scheduled time, said at least one system providing load to said target (column 6, lines 6-22.)

b. As per claims 2 and 20, Scarlet discloses the claimed invention as described above, and furthermore, Scarlet teaches the method wherein said target comprises a web site (column 3, lines 28-37.)

c. As per claims 3 and 21, Scarlet discloses the claimed invention as described above, and furthermore, Scarlet teaches the method wherein said target comprises a software component (column 3, lines 28-37.)

d. As per claims 5 and 23, Scarlet discloses the claimed invention as described above, and furthermore, Scarlet teaches the method wherein said at least one system provides load across a network to said target (column 2, lines 33-36.)

e. As per claims 8 and 26, Scarlet discloses the claimed invention as described above, and furthermore, Scarlet teaches wherein said network comprises the Internet (column 2, lines 33-36.)

Art Unit: 2141

5. Claims 11, 12, 14, 16, 29-31, and 35 are rejected under 35 U.S.C. 102(a) as being anticipated by Mercury (White Paper "Load Testing to Predict Web Performance").

a. As per claims 11 and 29, Mercury teaches a method of performing distributed monitoring of a target comprising the steps of:

identifying at least one system which meets a predetermined criteria;

scheduling said at least one system to monitor said target; and

deploying said at least one system at the scheduled time, said system providing monitor functions to said target (page 14, Step 6 section.)

b. As per claims 12 and 30, Mercury teaches the method wherein said target comprises a web site (page 14, Step 6 section, specifically the discussed use in Web servers.)

c. As per claim 14, Mercury teaches the method wherein said at least one system provides monitor functions across a network to said target (page 14, Step 6 section.)

d. As per claim 16, Mercury teaches the method wherein said network comprises the Internet (page 14, Step 6 section, specifically the discussed use in Web servers.)

e. As per claim 31, Mercury teaches the program product wherein said target comprises a software component (page 10-11, "Mercury LoadRunner" section.)

f. As per claim 35, Mercury teaches the program product wherein said systems provide load across a network to said target (page 14, Step 6 section, wherein running a test involves sending a load across a network.)

Claim Rejections - 35 USC § 103

6. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

7. Claims 4, 7, 22, 25, and 36 are rejected under 35 U.S.C. 103(a) as being unpatentable over Scarlat et al. (US Patent 6,477,483), and further in view of Mercury (White Paper "Load Testing to Predict Web Performance.")

a. As per claims 7 and 25, Scarlat discloses the claimed invention as described above, yet fails to teach the method wherein said software component is selected from the group consisting of EJB, Corba, COM, DCOM and COM+. Mercury teaches the method wherein said software component is selected from the group consisting of EJB, Corba, COM, DCOM and COM+ (page 10-11, "Mercury LoadRunner" section, wherein EJB, DCOM, and COM+ are other protocols although not explicitly named.)

It would have been obvious for one of ordinary skill in the art at the time the invention was made to use the software component of Mercury in the system of Scarlet, because doing so would enable a larger variety of test targets.

b. As per claim 4 and 22, Scarlet discloses the claimed invention as described above, yet fails to disclose the method wherein said predetermined criteria are selected from the group comprising: locations of said systems, sizes of said systems, speeds of said systems, and availability of said systems. Mercury teaches the method wherein said predetermined criteria are selected from the group comprising: locations of said systems, sizes of said systems, speeds of said systems, and availability of said systems (page 12-13, Step 3.) However, Mercury teaches these attributes for “emulated users” and not for physical systems (“said systems”).

It would have been obvious for one of ordinary skill in the art at the time the invention was made to have used the method of Mercury in the system of Scarlet, because using these attributes with physical systems would distribute and simplify the workload of the primary testing system.

c. As per claim 36, Scarlet teaches the claimed invention as described above, yet fails to disclose the program product wherein said network comprises the Internet. Mercury teaches the program product wherein said network comprises the Internet (page 14, Step 6 section, specifically the discussed use in Web servers.)

It would have been obvious for one of ordinary skill in the art at the time the invention was made to have used the network type taught by Mercury in the system of Scarlet, because doing so would increase the potential targets of the load testing system.

8. Claims 6, 9, 10, 17, 18, 15, 24, 27, 28, and 33 are rejected under 35 U.S.C. 103(a) as being unpatentable over Scarlet et al. (US Patent 6,477,483) as applied above, and further in view of Siefert (US Patent 5,721,906.)

a. As per claim 6, 15, and 24, Scarlet teaches the claimed invention as described in claims 1 and 19 above. However, Scarlet does not teach the step of defining a catalog of potential systems which meet said predetermined criteria and wherein said step of identifying at least one system is performed from said catalog of potential systems. Siefert teaches the step of defining a catalog of potential systems which meet said predetermined criteria and wherein said step of identifying at least one system is performed from said catalog of potential systems (column 4 line 15 to column 5 line 8.)

It would have been obvious to one of ordinary skill in the art at the time the invention was made to use the catalog of Siefert in the system of Scarlet, because doing so would organize the system data making selection more efficient.

b. As per claims 9, 17, and 27, Scarlet-Siefert teaches the claimed invention as described above. However, Scarlet-Siefert does not teach the method wherein said

catalog is dynamic. Siefert teaches a dynamic catalog (column 9 lines 9-35 wherein adding a resource requires a dynamic source.)

It would have been obvious to one of ordinary skill in the art at the time the invention was made to use the dynamic catalog of Siefert in the system of Scarlet-Siefert, because doing so would allow the catalog to be modified.

c. As per claims 10, 18, and 28, Scarlet-Siefert teaches the claimed invention as described above. However, Scarlet-Siefert does not teach the method wherein said catalog is static. Siefert teaches a static catalog (column 9 lines 9-35 wherein locating a resource without making modifications requires a static source.)

It would have been obvious to one of ordinary skill in the art at the time the invention was made to use the static catalog of Siefert in the system of Scarlet, because doing so would protect the catalog from modification.

d. As per claim 33, Scarlet-Siefert teaches the claimed invention as described above. However, Scarlet-Siefert does not teach the step of defining a catalog of potential systems which meet said predetermined criteria and wherein said step of identifying at least one system is performed from said catalog of potential systems. Siefert teaches the step of defining a catalog of potential systems which meet said predetermined criteria and wherein said step of identifying at least one system is performed from said catalog of potential systems (column 4 line 15 to column 5 line 8.)

It would have been obvious to one of ordinary skill in the art at the time the invention was made to use the catalog of Siefert in the system of Scarlet-Siefert, because doing so would organize the potential system data thereby making selection more efficient.

9. Claims 32 and 34 are rejected under 35 U.S.C. 103(a) as being unpatentable over Scarlet-Siefert as applied above (US Patent 6,477,483 and 5,721,906), and further in view of Mercury (White Paper "Load Testing to Predict Web Performance.")

a. As per claim 32, Scarlet-Siefert teaches the claimed invention as described above. However, Scarlet-Siefert does not teach the method wherein predetermined criteria are selected from the group comprising: locations of said systems, sizes of said systems, speed of said systems, and availability of said systems. Mercury teaches the method wherein said predetermined criteria are selected from the group comprising: locations of said systems, sizes of said systems, speeds of said systems, and availability of said systems (Mercury, page 12-13, Step 3, Mercury teaches these attributes for "emulated users" which is functionally identical to "said systems.")

It would have been obvious for one of ordinary skill in the art at the time the invention was made to use the method of Mercury in the system of Scarlet-Siefert, because doing so would distribute and therefore simplify the workload of the primary testing system.

b. As per claim 34, Scarlet-Siefert discloses the claimed invention as described above. However, Scarlet-Siefert fails to teach the method where said software component is selected from the group consisting of EJB, Corba, COM, DCOM, and COM+. Mercury teaches the method wherein said software component is selected from the group consisting of EJB, Corba, COM, DCOM and COM+ (page 10-11, "Mercury LoadRunner" section, wherein EJB, DCOM, and COM+ are other protocols though not explicitly named.)

It would have been obvious for one of ordinary skill in the art at the time the invention was made to use the software component of Mercury in the system of Scarlet-Siefert, because doing so would enable a larger variety of test targets.

10. Claims 13 is rejected under 35 U.S.C. 103(a) as being unpatentable over Mercury as applied above, and further in view of Siefert (US patent Number 5,721,906.)

As per claim 13, Mercury teaches the claimed invention as described in claims 11 and 29 above. However, Mercury does not teach the step of defining a catalog of potential systems which meet said predetermined criteria and wherein said step of identifying at least one system is performed from said catalog of potential systems. Siefert teaches the step of defining a catalog of potential systems which meet said predetermined criteria and wherein said step of identifying at least one system is performed from said catalog of potential systems (column 4 line 15 to column 5 line 8.)

It would have been obvious to one of ordinary skill in the art at the time the invention was made to use the catalog of Siefert in the system of Mercury, because

Art Unit: 2141

doing so would organize the potential system data thereby making selection more efficient.

Conclusion

11. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. This includes US Patent Numbers: 6,434,513, 6,341,310, and 5,870,559.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Nicholas R Taylor whose telephone number is (703) 605-4326 or (571) 272-3889. The examiner can normally be reached on Monday-Friday, 8:30am to 6:00pm, with alternating Fridays off.

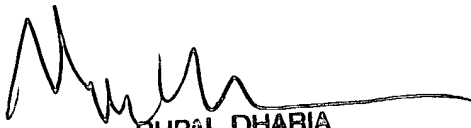
If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Rupal Dharia can be reached on (703) 305-4003. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Application/Control Number: 09/859,716
Art Unit: 2141

Page 12

Nicholas Taylor
Assistant Examiner
Art Unit 2141



RUPAL DHARIA
SUPERVISORY PATENT EXAMINER